

PERPLEXING FEDERAL CASES FROM MISSISSIPPI: LESSONS FOR SCHOOL ADMINISTRATORS

Abstract

Federal court cases are examined in an effort to view recent First Amendment rights infringements which have occurred in Mississippi. Case law reinforces students' rights to wear same-sex outfits to school functions as well as to bring same-sex dates. Connection to a recent civil rights investigation by the NAACP into a north Mississippi middle school demonstrates the strength of the organization inside Mississippi. Combined, the recent court cases and threats of litigation suggest that a stronger understanding of homosexual rights, as protected by the First Amendment, is necessary for administrators.

In the spring of 2010, the national spotlight was focused on a small rural school district in Mississippi. The political and legal firestorm which followed ultimately involved a federal judge, the ACLU, and an American Idol judge. The consequences of the case, along with the federal judge's ruling, should be used as a tool to stress to all current and future school administrators the importance of protecting a student's first amendment rights.

The First Amendment Rights

Choice of Same Sex Date at a School Function

School administrators must first make the distinction between dress codes and uniform policies. A dress code distinguishes what must not be worn and a uniform policy states what must be worn. Dress codes for the most part have been allowed by the federal courts, while uniform policies and the limits of such an action have been challenged. While school uniforms are considered to be in the uniform policy, their existences were formulated through the protection of the First amendment.

The First Amendment of the Constitution states, "Congress shall make no law...abridging the freedom of Speech" (U.S. Constitution, amend. I). The United States Supreme Court has also stated, "States and their agencies cannot set-out lesbians and gay men for special treatment, neither inclusive nor exclusive" (*Collins v. Scottsboro City Board of Education*, 38 Miss. ¶3, 2008). In *Fricke v. Lynch* (1980), the United States District Court of Rhode Island held that a male high school student's desire to take a same-sex date to his high school prom had significant expres-

sive content, which brought it within the purview of the First Amendment. The Rhode Island court stated Fricke's belief that he had a "right to attend and participate just like all other students and that it would be dishonest to his own sexual identity to take a girl to the dance" (491 F. Supp at 385). The court in *Fricke* further stated, "His attendance would have a certain political element and would be a statement for equal rights and human rights and thus considered protected speech" (491 F. Supp at 385). Even though the above-mentioned case is 30 years old, it has become the precedent case on this issue. Simply stated, the federal courts have recognized that if students are allowed to bring dates to a prom, then same-sex dates are permitted and viewed as freedom of speech.

While the issues of lesbian, gay or bisexual sexual orientations may conflict with an administrator's personal viewpoint as it did with the Mississippi prom incident discussed later in this article, the U.S. Supreme Court has clearly stated, "The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers" (*Spence v. Washington*, 418 U.S. 405 at 411, 1974).

Dress Codes at School or School Functions

The discussion of whether a lesbian, gay man, bisexual, or transgender person can wear clothes ultimately designed for the opposite sex to a prom has been clearly addressed by the federal courts. In *Canady v. Bossier Parish School Board* (2001), the Fifth Circuit Court of Appeals stated, "Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views" (240 F.3d 437 at 440). The court also stated, "The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the first amendment" (240 F.3d 437 at 440). The United States Supreme Court has also weighed in on this matter by stating that the First Amendment is in play in clothing when the "intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it" (*Spence v. Washington*, 418 U.S. 405 at 410, 1974).

There are strong precedents for the issuing of dress codes in a school environment. The U.S. Supreme Court has clearly considered the concept of the manner in which someone dresses under freedom of expression. "It is firmly stated that under the Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers" (*Street v. New York*, 394 U.S. 576, 1969). Of course, a dress code in a school environment can be necessary to maintain order for the learning environment. Because of this issue, the courts understand the importance for freedom of expression, while, at the same time, realizing there is a need to limit that freedom in educational environments. Although students have the right to freedom of speech, the "Constitutional protection is not absolute" (*Canady*, 240 F.3d 437 at 441, 2001).

In 2007, a student in California went to school wearing a shirt that violated the school dress code. The school code stated that shirts worn by the students could not contain printed messages. The student appeared in class wearing a shirt bearing the name “San Diego” printed on it. The student was told by the school authorities that he could not wear the shirt. He called home, and his parents brought him a new shirt to wear which read “John Edwards for President.” Again, the principal told him he could not wear this shirt because it also contained a printed message. The student subsequently filed a request for a federal injunction based on his First Amendment rights. Citing previous case law, the federal courts agreed with the school district and thus reinforced the constitutionality of school dress codes as long as they were applied to all students and did not violate the First Amendment.

The Supreme Court has issued major opinions concerning public school regulation of student speech. In 1969, in *Tinker v. Des Moines Independent Community School District*, a public school punished students who wore black armbands to school to protest the Vietnam War. The Supreme Court held that, “Students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” (393 U.S. 503 at 506, 1969), and “[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views” (393 U.S. 503 at 506, 1969). Schools can restrict student speech only if it materially interferes with or disrupts the school’s operation and cannot “suppress expressions of feelings with which they do not wish to contend” (393 U.S. 503 at 511, 1969).

Since *Tinker* (1969), every Supreme Court decision examining student speech has expanded the type of speech schools can regulate. In *Bethel School District v. Fraser* (1986), the Supreme Court ruled that schools can prohibit “sexually explicit, indecent, or lewd speech” (478 U.S. 675). The Supreme Court held in *Hazelwood School District v. Kuhlmeier* (1988) that schools can also regulate school-sponsored speech. Finally, in *Morse v. Frederick* (2007), the Supreme Court determined that schools can prohibit “[s]peech advocating illegal drug use” (§ 28).

In *Canady v. Bossier Parish School Board* (2001), the plaintiff presented the court with an argument against school uniforms. Canady argued that uniforms violated the First Amendment because they even banned student clothing that was not disruptive, lewd, or school-sponsored. Judge Parker, writing for the appellate court, recognized that the Supreme Court had established these categories for situations in which schools were targeting specific speech, but also stated that content-neutral regulations “do not readily conform to [any] of the three categories addressed by the Supreme Court” (p. 440). These cases all addressed “disciplinary action by school officials directed at the political content of student expression, not content-neutral regulations such as school uniforms” (p. 443).

Because the regulation was content-neutral, the appellate court

held that it should be analyzed under the rules of “traditional time, place and manner analysis and a test for expressive conduct” (*Canady v. Bossier Parish School Board*, 2001, p. 443). Thus, a school board’s uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest.

The Mississippi Prom Incident

The conflict in question occurred between the Itawamba County School District and Constance McMillen, an 18 year old female student. As early as the eighth grade, Constance had identified herself as a lesbian to school officials as well as to her fellow classmates. There had been no history recorded in the school record of violence or outrage exhibited toward Constance as a result of her sexual orientation. On February 5, 2010, the school district released a statement to the students detailing that the prom would be held in the high school commons area on April 2, 2010 (Figure 1).

MEMO

TO: Juniors and Seniors
FROM: Sandy Prestage and Sandra Sabine
DATE: Monday, February 5, 2010
RE: Prom

The 2010 IAHS Jr./Sr. Prom will be held Friday, April 2 in the IAHS commons. This year’s theme is *Masquerade*. We plan to make this a beautiful, elegant, unforgettable evening for you. Below is some important information; PLEASE READ CAREFULLY. Any comments, concerns, or questions can be directed to Mrs. Prestage in room 201.

- This year in lieu of a formal banquet, we have chosen to have heavy hors d’oeuvres at the Prom that can be enjoyed by both you and your date. This should cut down on waste and allow you to enjoy the entire evening together.
- Each Junior and Senior who would like to attend must pay the fee or receive a deferred payment from Mrs. Prestage (Juniors) or Mrs. Sabine (Seniors) by **Friday, February 5, 2010!**
 - The fee for a Junior or Senior is \$35; a guest ticket for \$10 (see criteria below).
 - Deferred payments will allow you to make payments. All fees must be paid by Friday, March 5.
 - We will accept late prom fees in the amount of \$45 for a Junior/Senior ticket and \$15 for a guest ticket between Monday, February 8 until Friday, March 5. **FRIDAY, MARCH 5TH IS THE ABSOLUTE DEADLINE!**
 - All tickets are nontransferable.
- Each Junior/Senior may invite one guest. Your guest should meet the following criteria:
 - may be in grade 9 or 10 at IAHS
 - may be in grade 9 - 12 at another high school
 - may be a college age student
 - must be of the opposite sex

Figure 1. Letter dated February 5, 2010 that was sent to all students.

Upon noticing the final point, “must be of the opposite sex,” Constance decided to approach several school administrators in order to determine whether she could bring her girlfriend, who was also a student, to the prom. Constance was told by the assistant principal that she could not attend with her girlfriend, but they “could attend with two guys as their dates but could not attend together as a couple” (*McMillen v. Itawamba School District*, 2010a, p. 2).

Constance would later expand in a radio interview where she declared she was told: “Prom is a formal event, and formal is girls in dresses and boys in tuxes.” The assistant principal later added, “I know it wouldn’t be a big deal if girls wear tuxedos but if some idiot boy shows up in a dress, I cannot refuse his entry if I allow a girl in with a tuxedo.” (Ross, 2010)

Deciding to move up the administrative ladder, Constance met privately with the principal, as well as with the superintendent. She was informed that she and her girlfriend would not be allowed to slow dance together because it could “push people’s buttons” (*McMillen v. Itawamba School District*, 2010a, p. 2). Constance testified in federal court that the superintendent had informed her that if she and her girlfriend made anyone uncomfortable while at the prom, she and her girlfriend would be “kicked out” (p.2). At that point Constance asked whether she would be allowed to wear a tuxedo to the prom. Both the principal and superintendent informed her that girls were not allowed even to wear slacks with a nice top to the prom; rather, they must wear dresses (2010a).

The Issue Goes Public

After believing her First Amendment rights had been violated twice by the school district (first in choice of date and second in choice of outfit), Constance decided to return to her day-to-day routine. Contrary to public opinion, she did not contact the ACLU over the prom issue. Instead, a few days following the incident, she accidentally discovered that a transgender male student was being told by the school administrators that he could not wear traditionally recognized female clothing. At that point, she contacted the ACLU and informed them of what was occurring regarding the male student. She also told them she knew the school had a history of discrimination because they told her she could not attend the prom in a tuxedo. The ACLU informed Constance that they wanted to pursue the prom issue (Ross, 2010). Through the ACLU’s legal and public relations departments, the issue quickly became a national topic of discussion. The ACLU presented a letter of demand to the school district stating that they wanted the district to change its policies which prevented Constance from attending the school prom while wearing a tuxedo and accompanied by a same-sex date. The letter went on to state that the school district had until March 10, 2010 to respond to the letter. Privately, the ACLU told Con-

stance they felt the school would quickly withdraw their protest and allow her to attend the prom (Ross, 2010). On March 9 the school district issued a Notice of Special Board Meeting to be held on March 10. The notice stated the meeting was called to “discuss matters involving prospective litigation” (*McMillen v. Itawamba County School District*, 2010a, p.3). On March 10 the school board met and released the following statement:

Due to distractions to the educational process caused by recent events, the Itawamba School District has decided to not host [sic] a prom at Itawamba Agricultural High School this year. It is our hope that private citizens will organize an event for the juniors and seniors. However, at this time, we feel that it is in the best interest of the Itawamba County School District not to host a junior/senior prom” (*McMillen v. Itawamba County School District*, 2010a, p.3).

Following the release of the school board’s statement, six days later the ACLU filed a motion seeking an injunction of the board’s decision not to have a school sponsored prom.

In addition to the legal maneuvering, news of the filed injunction immediately reached a national audience. All major national news sources reported the ACLU’s decision to seek an injunction against a Mississippi school. Constance also made several television appearances and told her story. Her appearance culminated with her March 19, 2010, appearance on the Ellen DeGeneres show (who was also at that time a judge for the widely popular American Idol show). During taping of the show, Ellen surprised Constance by awarding her a \$30,000 scholarship to any college of her choosing.

Public discourse aside, the issue of whether a mandated prom should be forced on the school was taken to a federal judge in north Mississippi. After hearing testimony from both sides, the federal judge ruled against granting the requested injunction. In his 12 page ruling, the judge agreed that the school district had clearly violated the First Amendment rights of Constance. The judge stated that the school district had “[i]nfringed upon Constance’s First Amendment rights and therefore, there is a substantial threat that irreparable harm will occur” (*McMillen v. Itawamba County School District*, 2010a, p.11) The judge also added that the school board’s argument that they were “[n]ot canceling the prom but merely withdrawing their sponsorship was nothing more than semantics” (p.11) As for the issue of the injunction and forcing the school district to conduct the prom, the federal judge determined that it was outside the power of the court to do such a thing. The court held that “issuing such an injunction would be disruptive and not in the best interest of the community” (p.11). However, in a very clear statement on the final page of his opinion, the federal judge stated, “The case remains active and the plaintiff, if she so desires, will be permitted to amend her complaint to seek compensatory damages and any other appropriate relief” (p.12). This of course would open the door for any financial litigation that might emerge.

After the court's decision, the issue of the school-sponsored prom was ultimately "dead in the water." What emerged was a series of private parties which were sponsored by various families. Lesbian groups, as well as wealthy business men in the area, offered to sponsor private proms for Constance and her friends. Constance stated in a radio interview that two private proms were created in the area. The first prom she was allowed to attend, but the second was immediately canceled when she bought her ticket. She did attend a private prom, but there were only six students in attendance (Ross, 2010). However, the reality of the situation was that many students chose just to stay at home and not attend any private prom. Constance eventually transferred to a larger school in Jackson, Mississippi (300 miles away) and graduated a few months later. In July 20, 2010, the judicial steps taken by Constance were concluded when the school district settled with Constance for \$35,000. This was followed by an October 25, 2010 decision awarding the ACLU \$81,665.50 in attorney fees (*McMillen v. Itawamba County School District*, 2010b). The Itawamba school district paid a \$10,000 insurance deductible and the remaining balance was paid by the district's insurance company (personal communication, November 4, 2010).

Ripple Effect

The outcome of the *McMillen v. Itawamba County School District* case has had a ripple effect throughout the region. On August 17, 2010, the ACLU filed a federal lawsuit on behalf of Ceara Sturgis, a lesbian teenage high school student who claims Copiah County School District discriminated against her on the basis of sex and gender stereotypes. Ceara was informed that Wesson High School students were required to wear formal clothing in their senior portraits, and that male students, but not female students, were permitted to wear tuxedos. At the photography studio, Ceara tried on the standard scoop-necked drape that female students were required to wear, but immediately felt deeply uncomfortable when she put it on. The thought of a portrait of her in the feminine clothing as a representation of her senior year embarrassed her, and she began crying (*Sturgis v. Copiah County School District*, 2010, p. 5). While she was crying, Ceara asked her mother to inquire of the photographer's assistant whether Ceara could instead wear a tuxedo. Her mother asked the assistant, who said yes. Ceara put on a tuxedo, which made her feel immediately relieved. On or about the first day of school, Ceara's mother went to Wesson and spoke to the assistant principal about whether the school would allow the portrait of Ceara in a tuxedo, as opposed to a scoop-necked drape, in the yearbook. He responded no and stated, "Tuxes for boys, drapes for girls" (p. 6). Ceara's mother then spoke with the Assistant Superintendent about the principal's decision. The assistant superintendent stated that there was no reason why Ceara could not wear a tuxedo for her senior portrait, since there were no district rules prohibiting such dress. He told Ceara's mother

to have the picture of her daughter in the tuxedo sent to Wesson for inclusion in the yearbook. Ceara's mother then provided the photography studio staff with the proof number of the photo Ceara wanted the yearbook to publish, a photo of Ceara wearing her tuxedo.

The day that yearbook photos were due at the school, an employee from the district called Ceara's mother and told her that the district had spoken with its lawyers and that the district would not allow Ceara's photo in the yearbook. Ceara's mother then went to Wesson High School to speak with the principal to ask him to reconsider his decision. He refused to do so. By letter, dated October 13, 2009, Ceara and her mother, through counsel, submitted a written request to all defendants requesting that defendants allow the portrait of Ceara in a tuxedo to be published in the school yearbook, challenging the principal's policy as impermissible sex discrimination. By letter dated October 16, 2009, defendants, through counsel, denied plaintiff's request. In the spring of 2010, Ceara received her copy of the 2010 Wesson yearbook. Neither her name nor her photo appeared in the yearbook's senior portrait section. When Ceara saw that she had been excluded from the senior portrait section, she became extremely upset (*Sturgis v. Copiah County School District*, 2010). The incident occurred in 2009, one year before the more publicized prom incident.

The ACLU cited Title IX, which prohibits discrimination based on sex and sex stereotypes, and the Fourteenth Amendment, which guarantees equal protection. The ACLU declared, "Inclusion in the senior yearbook is a rite of passage for students and it is shameful that Ceara was denied that chance" (*Sturgis v. Copiah County School District*, 2010, p. 9). Ceara is seeking monetary compensation as well as attorney fees. The case is still pending in the federal court system.

Connection to Civil Rights?

In August 2010, Nettleton Middle School in North Mississippi sent the following letter to students' homes concerning class election for officers. The school justified the memo by claiming that the school district was guaranteeing African-American students would be elected to certain offices. The offices reserved for whites, or blacks, were rotated each year. As soon as the memo was released, the NAACP requested a justice department investigation. The superintendent released a statement reading, "It is the belief of the current administration that these procedures were implemented to help ensure minority representation and involvement in the student body" ("Mississippi," 2010, ¶ 2). Nettleton Superintendent Russell Taylor said in a statement, "Therefore, beginning immediately, student elections at Nettleton School District will no longer have a classification of ethnicity. It is our intent that each student has [sic] equal opportunity to seek election for any student office" (¶ 2).

NMS Class Officer Elections		
2010-2011		
8	7	6
President – White	President – White	President – White
V-President – Black	V-President – White	V-President – White
Sec-Treas – White	Sec-Treas – Black	Sec-Treas – White
Reporter – Black	Reporter – White	Reporter – Black

Criteria:

- This application must include 10 signatures from students of the same grade level.
- The student must have attended Nettleton School District the previous school year for both semesters.
- The student must have passed all subjects taken the previous school year by the end of last semester.
- The student must have a “B” average.
- The student must have a good disciplinary status and moral character.
- The student must have a good attendance record.

PLEASE SECURE 10 SIGNATURES FROM STUDENTS IN YOUR GRADE! Turn back into Mrs. Payne by
AUGUST 24 BY 3:00 P.M.

Figure 2. Letter sent to parents by the Principal of the Nettleton Middle School.

This quick reversal of decisions by the school district demonstrates a possible double standard in relationship with gay and lesbian rights. Perhaps due to the violent history of the Civil Rights movement of the 60s, along with the negative images Mississippi is attempting to overcome, the state is quick to respond to NAACP demands (which it should). However, in contrast to its long record relative to the Civil Rights Movement, the state does not have an extensive history with gay rights and perhaps the recent events surrounding the prom and yearbook photo demonstrate a new moment that the local school districts are attempting to address. Perhaps cooler heads will prevail, and the local school district can learn from the integration movement of the 60s and apply them to gay rights issues in the new century. An approach of compromise and understanding should replace one in which the schools are more than willing to go to court in defense of such clear First Amendment violations.

Lesson Learned for Current and Future Administrators

The outcomes of the recent legal challenges, as well as the new federal lawsuits, demonstrate a stronger ACLU presence in the area of sexual orientation rights in the field of education and a need for school administrators to protect the rights of all students. While the rights of lesbians and gay men have been established by the courts, the merging of these First Amendment rights into the field of public education is a relatively

new development. This movement is not isolated to the state of Mississippi but instead concerns the nation as a whole. In 2002, the ACLU won a federal lawsuit forcing the Visalia School District in California to adopt a stronger program to address anti-homosexual harassment. Therefore, the concept of protecting the rights of homosexual students by the ACLU was not born with the Mississippi prom incident, but in fact has been an issue for the past decade. The Itawamba School District's administration decided to go against an established ACLU position, which had the backing of previous federal court decisions. One issue that may cause more concerns for school officials is the role of the schools in the community. With the emergence of more and more extracurricular activities sponsored by school districts, this in turn extends the school's presence in the community. While proms are events rich in a school's history, they do occur after the traditional school day has ended. While the final bell rings at 3 p.m., the after-school events will occur with the school board's approval and thus extend a principal's work day and professional responsibility. The effects of the extension of the school day on administrators, both physically and mentally, are beyond the scope of this case study. However, in viewing the issues involving freedom of speech and lesbian and gay men's rights, school leaders may face serious legal challenges if they do not follow these guidelines.

- "A school administrator should create flexible, yet consistent, guidelines that cut across all religious, social and political divisions, and are based on the best interests of the children, in the light of their physical, emotional and developmental needs, is [sic] a sensible and pragmatic way in which to approach symbolic clothing." (Gereluk, 2007, p. 656).
- School officials must remember they are responsible both for creating a safe and positive learning environment as well as ensuring that the personal rights of students are not violated with respect to fundamental fairness.
- "Restrictions on free speech in the form of what a student can wear should be based on sustainable evidence of significant disruption to the education environment that effect [sic] order and discipline in the school and impede the teaching and learning process." (Essex, 2005, p. 45).
- School administrators could create a committee to review students' appeals concerning uniform policy and/or dress codes. The committee could include a member of the community with legal experience.
- Keeping the Mississippi prom and the current yearbook case in mind may assist school administrators as much as might refresher courses on First Amendment rights of their students.
- Open channels of communication between the parents and the administration should be established. This openness can be enhanced by a strong and permanent parent-teacher organization.

- Nowhere in the state of Mississippi's curriculum framework is the issue of gay rights mentioned. This should be amended and incorporated into the curriculum of classes such as U.S. History and/or U.S. Government.

Summary

The rights provided by the First Amendment are not provided for a select class of citizens. School administrators should tread carefully when planning events such as the prom, the election of class officers, or the publication of yearbooks. While principals are not expected to be scholars in the field of federal case law, the cases quoted in the report have been established case law when dealing with sexual orientation issues. The issue of civil rights, especially in the state of Mississippi, emerges from time to time but should not be limited to African-American issues. The state of Mississippi, and the field of education as a whole, is seeing the rise of lesbians' and gay men's rights. Through proper application of case law, as well as the use of the guidelines mentioned in this article, a school administrator will most likely not receive an inquiring letter from the ACLU or NAACP, but, rather, will be ever-vigilant in protecting the First Amendment rights of students.

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Lindon J. Ratliff is an Assistant Professor of Curriculum and Instruction, Secondary Education in the Department of Education at Mississippi State University, Meridian, Mississippi.